Nos. 96-552 and 553

In The

Supreme Court of the United States

October Term, 1996

RACHEL AGOSTINI, *et al.*,

Petitioners,

-and-

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et ano.*,

Petitioners,

vs.

BETTY-LOUISE FELTON, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

STANLEY GELLER
Counsel of Record
Attorney for Respondents
750 Lexington Avenue
New York, New York 10022
(212) 486-4590

70871
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, Inc.

TABLE OF CONTENTS

Contents

Contents

TABLE OF CITATIONS

Cases Cited:

Contents

Contents

Contents

Contents

Contents

COUNTERSTATEMENT OF THE FACTS

1. Introduction

In this counterstatement, Respondents will not attempt to describe the Title I statute, for two reasons. First and foremost, Respondents have not, from the commencement of this case in 1978, challenged the statute. Rather, they have challenged the actual plan or program the Chancellor placed in operation in "nonpublic" schools in New York City, beginning in or about 1965, purportedly under the statute ("Program"), and they have challenged the statute only to the extent it might be construed to authorize that Program (JA 9-13). Second, Petitioners' description of the statute in their briefs is adequate.

This counterstatement, however, is made necessary because Petitioners' statement of the Program is woefully inadequate and misleading in critical respects.

2. The "Nonpublic" Schools in the Program.

There does not appear to be any statement in the documents submitted by the original defendants in this case concerning the percentage of "nonpublic" school students receiving instruction and guidance in the Program who attended parochial schools. In any event, the percentage of such students in the current New York City Title I program (off the premises of such schools) is more instructive if, as Petitioners propose, the Program is to be reinstituted. According to Petitioner The Board of Education of the City School District of the City of New York ("Board of Education"), *the percentage of "nonpublic" school students in the current program who attend parochial schools is no less than 99.52.* (Decl. of Margaret O. Weiss, dtd. 6/9/95, pp. 469-70, paragraph 13 [annexed to memorandum of Agostini Petitioners in support of their Rule 60(b) motion and referred to at JA 300]).

The Program under consideration in this case, therefore, is by no means one that would serve "a broad class of citizens defined without reference to religion." (Agostini Br., p. 16). It would serve students attending parochial schools only when their schools elect to participate in the Program.

Continuing at this point with the most current statistics available through the school year 1993-94, approximately 86% of the "nonpublic" school students in the current New York City Title I program attended Roman Catholic schools, and 8% attended Hebrew Day schools. (JA 341).

In this connection, it is noteworthy that as recently as 1993, one of the highest officials of the Roman Catholic Church in New York City reiterated the Church's position that "[t]he primary mission of the parochial school remains the teaching of religion," and without that mission, developed and published in a "mission statement," a Catholic parochial school "has no reason for its existence." (Aff. of Stanley Geller, dtd. 12/26/95 in opposition to the Rule 60(b) motions, referred to at JA 299.) There is no documentation in the record of this case concerning the sectarian nature of the Hebrew Day schools, but the nature of those schools that are operated by Hasidic sects can be gleaned from the description of the sizeable Satmar sect in *Board of Education of Kiryas Joel School District v. Grumet*, 114 S. Ct. 2481, 2485 (1994). In any event, there is no claim in this proceeding that either the Roman Catholic schools or the Hebrew Day schools in New York City are not "pervasively" sectarian.

Under the Program since its inception until 1985,[1] Catholic parochial school teachers were not required to be Catholic, but

---

1. One of the defects in this unique proceeding, purportedly under Rule 60(b), is that there has been no opportunity in the proceeding to develop facts relevant to the grave constitutional question now under consideration. This forces Respondents to shuttle between current dates and pre-1989 dates.

they were required, as a condition of hiring, to agree "to cooperate with the policies of the school, the religious education program, value education and the general Catholic atmosphere of respect for each other, for learning and for God." (JA 263.)

Even in the secular courses in those Catholic parochial schools, the teachers were "encouraged to expose students to the moral and value dimension of the subject matter within a Christian framework." (JA 265.)

3. The Program in Operation.

Under the Program, the benefits of Title I were clearly extended to parochial school students only through their schools. First, students who were eligible were unable to participate if the total number of eligible students in their school was too small to make it practical for the Board of Education to assign even one teacher or guidance counselor to their school. (JA 43.) Second, even if the total number of eligible students in a parochial school was large enough, their participation required the school's principal to arrange for the services to be provided at the school. (JA 60-61.) No student or parent could make any such arrangement. (*Id.*) Third, because of a lack of funds, although the eligibility of each student attending a parochial school was established objectively, the selection of a student for actual participation in the Program was in major part determined by the teachers and principal of the school. (JA 237-50.)

4. The Public School Teachers and Counselors.

Although hired, paid and, theoretically, under the complete control of the Board of Education, public school teachers and counselors providing services in the Program were assigned to parochial schools on a purely voluntary basis, a procedure that

was deemed to ensure that they would be comfortable performing services in a parochial school. (JA 48.)

Additionally, those public school teachers and counselors were selected without reference to their religious preference, and without any screening application questions to that effect. (JA 49.) Thus, a substantial number of the teachers who volunteered who were Catholic were undoubtedly assigned to Catholic parochial schools, and a substantial number who were Jewish were assigned to Hebrew Day schools.

In the motions for summary judgment in this case in 1982, the Chancellor stressed the alleged fact that the public school teachers and counselors in the Program were "itinerant" because allegedly 78 percent spent "less than five days a week" at any one parochial school. *Felton v. Secretary, U.S. Dep't of Educ.*, 739 F.2d 48, 66 (2d Cir. 1984). As Judge Friendly noted, however, that meant that a substantial number, 22 percent, spent a full week at one parochial school, and thus were hardly "itinerant." (*Id.*) The Chancellor also argued that the students at 180 of the 231 participating parochial schools allegedly received Title I services from "itinerant" teachers and counselors. (*Id.*) But as Judge Friendly pointed out, that meant that the students at no less than 51 parochial schools received services from public school teachers and counselors who performed their services at those schools as regularly as their parochial school counterparts. (*Id.*)

Under the Program, although the public school teachers and counselors assigned to parochial schools were instructed that they were solely accountable to, and subject to the supervision of, the Board of Education, and that they, the teachers and counselors, were solely or ultimately responsible for virtually all aspects of the Program as actually administered in the parochial schools, they spent far less time with their supervisors

than with their parochial school counterparts and principals, and they appeared to give far less attention to their instructions than to the advice and recommendations of the parochial school personnel. (JA 237-250.)

Thus, the public school teachers conferred regularly with the parochial school teachers and principals concerning all aspects of the Program. (*Id.*) They decided with the parochial school teachers, and to a lesser extent with the parochial school principals, which parochial school students eligible to receive their services would actually receive them. (JA 239, 240, 242, 244.) They accepted referrals to the clinical and guidance services of the Program made by the parochial school teachers and principals. (JA 237, 239, 245, 248, 249.) At times, they requested those services jointly with their parochial school counterparts. (JA 245.)

To quote the OEE Evaluation Reports issued by the Board of Education, the public school teachers assigned to parochial schools participating in the Program, "find out what the classroom [parochial school] teachers are teaching and/or coordinate lessons." (JA 240.) They conferred with the parochial school teachers to ascertain the specific weaknesses of students in their regular classroom studies in order to help the students in those studies. (JA 23.) And they also helped directly with regular classroom studies. (JA 237.)

The public school clinical and guidance counselors assigned to parochial schools worked with the parochial school teachers "in formulating comprehensive treatment plans." (JA 249). They used a "team approach." (JA 250.)

In short, in the Program's actual operation, the public school teachers and counselors assigned to parochial schools were as much a part of the faculty of those schools as the parochial school

staff. They worked together in a manner that made it virtually impossible to determine — if anyone sought to determine — who was actually, as opposed to theoretically, responsible for virtually any decision. Additionally, and no less significantly, the public school teachers and counselors removed a huge burden from the shoulders of the regular classroom teachers by taking over the task of raising to grade level — in the critical subjects of reading, mathematics and learning English as a second language — those students who were below grade level. This enabled the classroom teacher to proceed with the instruction of the rest of his/her class in a manner and at a pace that would otherwise have been impossible.

5. The Supervision of Public School Personnel.

Under the Program, one Board of Education field supervisor was "ordinarily" responsible for supervising the work of 22 public school teachers assigned to parochial schools. (JA 53.) The supervisor, therefore, could do little more than "attempt" to make "at least one unannounced visit to each teacher each month." (*Id.*) The primary purpose of such visits, moreover, was to evaluate the teacher's performance from an educational viewpoint. (*Id.*)

With respect to the "unannounced" nature of those monthly visits, it is noteworthy that a class under the Program as administered in a "Title I classroom" (inside the parochial school), consisted of *ten or fewer* students in addition to the teacher. (JA 51.) Clearly, therefore, although the supervisor may have been "unannounced" before he walked through the door of the classroom, he was hardly so thereafter if, among other things, he was checking to see if the teacher was engaging in any conduct offensive to the Establishment Clause.

Assuming, moreover, that the occasional visits of a

supervisor were a form of surveillance calculated to uncover such conduct, there is not an iota of evidence in this case of any surveillance of any public school teacher or counselor outside of an actual class, such as when they were in conference with a parochial school teacher or principal. There is also no evidence of any form of interrogation of any public school teacher or counselor assigned to a parochial school or of any student, teacher or principal of a parochial school or any parent of any such student concerning any conduct offensive to the Establishment Clause. (And one can imagine what a "brouhaha" there would have been if any such interrogation of parochial school personnel had ever been attempted.)

There is not the slightest reference in any of the OEE Evaluation Reports to any matter relating to conduct offensive to the Establishment Clause. (JA 237-250.)

It is a matter of small wonder, therefore, that in 1982, the Corporation Counsel of the City of New York could state, in good conscience, on behalf of his client, the Chancellor, that there was no "known" instance of any public school teacher or guidance counselor assigned to a parochial school engaging in any conduct offensive to the Establishment Clause. There was no system in effect that was calculated to bring any such conduct to the attention of the Chancellor or the Board of Education.

6. The Post-*Aguilar* Plan or Program.

After *Aguilar,* the Chancellor, together with the Board of Education, was given one year by the District Court to develop an alternative plan to the now-prohibited Program. (Order of District Judge Neaher, filed 9/26/85, to which reference is made at JA 299.)

In the initial plan proposed by the Chancellor for the school

year 1986-87, 80% of the parochial schools that had participated in the (pre-*Aguilar)* Program were offered space in "matching" public schools in which their eligible students might receive Title I services. (JA 516.) Each "matching" school was no more than 10 minutes away from the parochial school with which it was paired. (JA 522.) The City proponents of the plan considered it to be "as educationally beneficial and cost effective as possible within the constraints imposed by the *Aguilar* decision." (JA 515.) Suffice it to say in this proceeding that the offer of "matching" public schools was rejected out of hand by the principals of the parochial schools to which it was made (JA 528). Specifically, the offer was rejected by 142 of the 194 principals to whom it was made. (JA 711.)

As a result of this action by the parochial school principals, whether justified or not, the number of parochial school students who received Title I services in the school year 1986-87 was 50 percent lower than had received such services in the school year 1985-86, the last year under the (pre-*Aguilar)* Program. (JA 712.) Clearly, the parochial schools authorities exercised a veto power over whether their students received Title I services.

The post-*Aguilar* plan or Program ultimately developed and presently in operation in New York City with respect to parochial schools ("Post-*Aguilar* Program") has four components. The most important of these, and the most expensive, entails the use of mobile instructional units ("MIUs"), buses fitted out as classrooms and driven to, or in the immediate vicinity of, the participating parochial schools (JA 319-323.) Each MIU, and in the school year 1994-95 there were 126 of them, costs $106,934 per year to rent. (JA 323, 338.)

The other three components of the Post-*Aguilar* Plan — an ever decreasing number of public school classrooms, a few

allegedly "neutral" leased locations, and a computer-assisted program — are of far less significance and far less costly than the MIUs, and they are adequately described for present purposes in the papers submitted by the Chancellor and the Board of Education in the District Court (JA 316-319, 323-329, 336).

7. The Alleged Administrative and Financial Burdens of the Post-*Aguilar* Program.

Petitioners and the Secretary complain of the alleged administrative and financial burdens of the Post-*Aguilar* Program (Chancellor's Br., p. 16; Agostini Br., p. 10; Secretary's Br., pp. 37-38). Below, Respondents will argue the legal merits, or demerits, of their complaints. Here, suffice it to say, these complaints are extremely tardy and woefully exaggerated.

With respect to the alleged administrative burden, it bears repeating that the chief component of the Post-*Aguilar* Plan are the MIUs. The bleak scene portrayed in the Secretary's brief of a "teacher leading the children out into the cloudy ten-degree day and across 100 yards of an ice-covered parking lot to return to their school" (Br., p. 38) from some "van" or "portable classroom" that is "cramped and noisy" (Br., p. 37) bears no resemblance to any scene in New York City under the Post-*Aguilar* Program.

First, as noted, the MIUs used in the Post-*Aguilar* Program are parked at the door of the parochial school to which they are dispatched unless the door has a fire hydrant at the curb or faces a one-way street, in which event they may be parked a few feet away from the door or across the street. (Weiss Decl. of 6/9/95, *supra*, pp. 29-30.) Second, the MIUs in the Post-*Aguilar* Program are not "cramped" or "noisy" for students, and neither the Chancellor nor the Board of Education has described them as

such. (JA 320-323; *see also*, the originals of photographs of the MIUs attached to the Weiss Declaration of 10/16/95, of which copies appear at JA 465-467.) They may lack bathroom facilities for a student who might possibly need such facilities during class (Chancellor's Br., p. 14), but so does every classroom in a parochial school building, and the walk from an MIU parked at the door, or in the immediate vicinity, of a parochial school to a bathroom in that building is not likely to be farther than a walk from a classroom to a bathroom in the building.

Third, and most important, it is more than questionable that the time taken for a student in a parochial school to attend or return from class in an MIU would be more than the 10 minutes consumed in a normal recess between classes. All of the foregoing applies to the public school teachers and counselors and their parochial school counterpart who might wish to confer within an MIU. If a parochial school teacher is discouraged from participating in a conference in an MIU parked just outside the school door, he/she ought to be replaced as fast as the principal can find time to effect the replacement.

The alleged financial burdens are also exaggerated. Here is what the Chancellor and Board stated concerning them elsewhere:

> Nevertheless, even under a statistical analysis, *the New York City Board's expenditures for post-Aguilar delivery methods have been far from 'excessive' or 'disproportionate'* .... This is especially clear when those expenditures are compared to the Board's total [Title] I expenditures, as they must be. . . . *For example, in the school year 1987-88, the Board spent a total of $197,657,498 under [Title I] (including*

> *federal and state capital expenses). . . . In the same year, the Board spent $7,917,102 for the noninstructional costs of post-Aguilar methods — approximately 4% of the total.*

Gov't. Defts. Memo. in Support of Motion for Summary Judgment, pp. 60-61, *Committee for Public Education v. Secretary, U.S. Dep't. of Educ.*, 88 Civ. 96 (JG) (E.D.N.Y. 1996) (emphasis added).

Additionally, both the alleged administrative and financial burdens of the Post-*Aguilar* Program have been apparent since at least 1984 when Petitioners' predecessors in this case sought to use them to convince the Court of Appeals for the Second Circuit not to rule the (pre-*Aguilar*) Program unconstitutional. (730 F.2d 48, 71; *see also*, the charts reflecting post-*Aguilar* expenditures since the school year 1986-87, submitted by the Chancellor and Board of Education more recently in their Rule 60(b) motion in the District Court [JA 344-346].)

SUMMARY OF ARGUMENT

I.

Rule 60(b) is not a proper vehicle for Petitioners to seek or obtain a rehearing of a case decided by this Court twelve years ago. Such an unprecedented use of the Rule is particularly inappropriate where, as here, the sole basis for the motion is that recent dicta by Justices in an unrelated case amounted to a "significant change in the law" warranting relief from a prior judgment.

The dicta relied upon by Petitioners in the dissenting and concurring opinions in *Kiryas Joel Village School District v. Grumet*, 114 S. Ct. 2481 (1994) although critical of *Aguilar*,

could not and did not have the effect of overruling that precedent. Not only does dictum lack binding legal authority, it is an unreliable predictor of how the Court, or even an individual Justice, will ultimately decide an issue when fully briefed and presented for review.

Petitioners cannot justify their Rule 60(b) motions by relying on "changed factual conditions" when the alleged changed facts were apparent to them before, and known to them shortly after, *Aguilar* was decided. Nor can Petitioners rely upon intervening changes in decisional law as a basis for their motions where it is undisputed that *Aguilar* remains the controlling authority in this case. Petitioners' reliance on generalized statements about the broad equity powers of the federal courts is also unavailing. Rule 60(b) is not a source of judicial power and cannot enlarge or modify any substantive rights. Petitioners can point to nothing in the language of the Rule, its historical precedents, or its interpretive case law to support their contention that relief from a final judgment may be based on an *anticipated* change in the law. Rule 60(b) was designed to ameliorate procedural infirmities and inequities where there has been an actual change in the law, not to effect such a change.

Petitioners' proposed use of Rule 60(b) threatens to increase the burdens on federal courts. It will encourage litigants to make motions that district courts and courts of appeals are powerless to grant in order to obtain what is in effect an original hearing in this Court. This runs directly counter to the efforts of Congress and the Court to limit the Court's jurisdiction and case load, and possibly the Constitution's limitations on the Court's power. This novel use of Rule 60(b) will also invite tenacious litigants and enterprising counsel to seek reconsideration of final judgments based on little more than speculation that a change in the Court's membership, or even a perceived change in one Justice's view, might increase their chances of a better result the second time around.

The Court's institutional integrity will be compromised if the views expressed by individual Justices are accepted as bases for Rule 60(b) motions. The legitimacy of the Court derives from its steadfast adherence to the rule of law and its refusal to allow constitutional doctrine to vacillate with changes in the Court's membership. If the Court permits precedent to be reopened on the basis of prognostication and head-counting, it will feed the perception that the Court is no different from any political body.

II.

In addressing the question whether the Court should overrule *Aguilar,* Petitioners abuse the concept of "neutrality" as if the mere repetition of the word will solve virtually any question relating to the Establishment Clause. After doing so, Petitioners, particularly the Agostini Petitioners, are forced to acknowledge that there are substantial questions in this case that require more than a general reference to the concept of "neutrality."

Petitioners try to fit the Program in this case, in which public funds were used to have public school teachers and guidance counselors provide remedial instruction and counseling to students attending parochial schools inside those schools, into the category of one in which government benefits were made available generally to a broad class of citizens defined without reference to religion. They do so, by reference to the broad, general wording of the statute, known as "Title I," under which the program was purportedly developed and placed in operation.

Respondents, however, have not from the beginning of this case challenged the statute facially. Rather, we opposed the New York City actual plan or program ("Program") as it was in operation prior to 1985, and we now oppose its re-institution. We deny that the Program falls into the category suggested by

Petitioners. Rather, we say that it falls into the category of programs in which public funds have been used to subsidize the religious function or mission of parochial schools by relieving them of the burden of providing instruction in basic secular subjects.

Respondents submit further that the Program falls into the category of one that creates a symbolic union of government and religion or religious schools and thereby conveys to the students of the participating parochial schools and the general public a message of government endorsement of religion and, more particularly, the religious mission of the parochial schools.

Respondents submit lastly that the Program is one that presents the danger that public school teachers and guidance counselors performing services inside parochial schools, regularly, and virtually as members of the faculty or staff of those schools are likely to engage in conduct offensive to the Establishment, deliberately, ignorantly or inadvertently, and that, because it is a danger that cannot be prevented by any system of surveillance that would be feasible, it can only be prevented by the prophylactic measure of prohibiting, or continuing to prohibit, any program that would place public teachers or counselors in that position.

Respondents eschew reference to, or support of, any "prong" of the three-prong test first announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Rather, we will rely on cases accepted as precedents by the Court and involving facts close to those in the present case, such as *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), the companion case to *Aguilar*.

We believe we will be able to demonstrate that the few cases on which Petitioners are forced to rely are inapposite, and that *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), which is Petitioners' closest case in point, is still substantially

different on its facts, relating as it does to individualized assistance to a single handicapped student attending a parochial school, whereas this case involves a massive program of assistance to entire parochial schools, constitutes a clear example of a fusion of government and religious activities and unnecessarily places public employees in a position were they are likely to support the religious mission of parochial school.

ARGUMENT

I.

RULE 60(b) IS NOT A PROPER VEHICLE TO RECONSIDER THIS CASE.

Relying on dicta by members of this Court in an unrelated decision, Petitioners seek to reargue, under the guise of Rule 60(b), an appeal they lost in the Court more than twelve years ago. This unprecedented use of Rule 60(b) violates any reasonable interpretation of the scope of that rule, and threatens to compromise the institutional integrity of the Court. To hold that views of individual Justices — whether expressed in dicta, speeches, or law review articles — may constitute a "significant change in law" under Rule 60(b) would validate "head-counting" and speculation as a ground for relief from final judgments. Whatever this Court's views on the continued vitality of *Aguilar v. Felton* as a statement of Establishment Clause doctrine, Petitioners' Rule 60(b) motions are not proper vehicles to revisit the merits of a twelve-year-old decision. Petitioners do not meet the movant's burden under Rule 60(b)(5) which this Court has described as follows:

> Rule 60(b)(5) provides that a party may obtain relief from a court order when "it is no longer equitable that the judgment should have prospective application," not when it is

> no longer convenient to live with the terms of a consent decree. . . . A party seeking modification of a consent decree may meet its initial burden by showing either a significant change either in factual conditions or in law.

Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 383-84 (1992).[2]

A. The Dicta in *Kiryas Joel* Are Not A Change In Law Justifying Relief Under Rule 60(b)(5).

In support of their contention that there has been a "significant change in law," Petitioners rely on dicta of individual Justices in dissenting and concurring opinions in *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994). The *Kiryas Joel* majority mentioned *Aguilar* only in passing, *id.* at 2485. Armed only with this less-than-definitive dicta, Petitioners moved before the district court under Rule 60(b) on the ground that "the criticisms of *Aguilar* by five Supreme Court justices in the *Kiryas Joel* case not only portend a significant change in the law, but actually constitute one." (Dist. Ct. Op. at 5-6., referred to at JA 301.)

"[T]his Court does not decide important questions of law by cursory dicta inserted in unrelated cases." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968); *see also Kastigar v. United States*, 406 U.S. 441, 454-55 (1972) (broad language unnecessary to Court's decision cannot be considered binding authority). Not only does dictum lack binding authority, it is an

---

2. Although *Rufo* involved a consent decree, the district court held (Dist. Ct. Op. at 6), and petitioners agree, that *Rufo*'s general statements concerning the appropriate standard for relief under Rule 60(b) are applicable here.

unreliable predictor of how individual Justices, much less the Court, will decide constitutional questions. On more than one occasion, members of this Court have decided an issue in a manner inconsistent with their earlier suggestions in dicta. *Compare O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996) *with Rutan v. Republican Party*, 497 U.S. 62, 92 (1990) (Scalia, J., dissenting, joined by Rehnquist, C.J., Kennedy, J., and in part by O'Connor, J.); *and Planned Parenthood v. Casey*, 505 U.S. 833 (1992) with *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (plurality opinion of Rehnquist, C.J., joined by White and Kennedy, JJ.), and *id.* at 522 (O'Connor, J., concurring).

Justices' dicta do not and cannot amount to a change in the law. Article III of the Constitution requires a "case or controversy" before this or any other federal court is authorized to construe the law, and equating the *Kiryas Joel* dicta with a "significant change in law" would countenance precisely the kind of advisory opinions the case or controversy requirement forbids. The district court, and the court of appeals which adopted the district court's opinion, recognized that *Aguilar* remains controlling law. Therefore the *Kiryas Joel* dicta simply do not constitute a "significant change in law" warranting relief under Rule 60(b).

B. Alleged Changes In Factual Conditions And Law Are No Basis For Petitioners' Invocation of Rule 60(b).

No doubt recognizing that the comments in *Kiryas Joel* are a dubious basis for their Rule 60(b) motions, Petitioners now propose other possible justifications for overruling *Aguilar*.[3] In

---

3. In their brief before the court of appeals, the Chancellor and Board of Education made clear in the only point heading of their argument that they were relying solely upon the *Kiryas Joel* dicta:

(Cont'd)

particular, they point to the "enormous cost of compliance" with *Aguilar* as well as "intervening developments" in the governing Establishment Clause principles. (Agostini Br., p. 46.) These additional grounds, however, did not and could not form the basis for Petitioners' Rule 60(b) motions.

As noted above, Petitioners knew the cost of complying with *Aguilar* for almost a decade before they sought relief from that decision, allegedly on that basis, under Rule 60(b). Thus, that cost of compliance cannot represent the requisite significant change in circumstances warranting relief under Rule 60(b) according to one of the cases on which they rely most heavily (*Rufo*, 502 U.S. at 384), and their motion under the Rule, to the extent it is based on that cost, must be denied.

Similarly, Petitioners' reference to "intervening developments" in decisional law provides no basis to invoke Rule 60(b). It is undisputed that no decision has overruled

---

(Cont'd)

> THE INJUCTION CONTAINED IN THE SEPTEMBER 26, 1986 JUDGMENT IS NO LONGER PROPERLY SUPPORTED BY ESTABLISHMENT CLAUSE JURISPRUDENCE. A MAJORITY OF THE CURRENT MEMBERS OF THE SUPREME COURT HAVE CALLED FOR RECONSIDERATION OF *AGUILAR v. FELTON*. THUS DEFENDANTS ARE ENTITLED TO RELIEF FROM THAT INJUNCTION PURSUANT TO RULE 60(b)(5). SHOULD THIS COURT DETERMINE THAT THE DISTRICT COURT PROPERLY DENIED OUR MOTION, WE RESPECTFULLY REQUEST THAT IT DECIDE THIS APPEAL EXPEDITIOUSLY SO THAT DEFENDANTS MAY PROMPTLY SEEK SUPREME COURT REVIEW.

(Brief of Defendants-Appellants to Court of Appeals for the Second Circuit ("Bd. App. Br.") at 38.)

Aguilar.[4] The cases cited by Petitioners applied this Court's Establishment Clause doctrine; these cases have not "changed to make legal what the decree [in *Aguilar*] was designed to prevent." *Rufo*, 502 U.S. at 388-89. To hold that interpretation of law automatically opens the door for relitigation of the merits of every potentially affected judgment would significantly undermine finality of judgments. *Id.*

Since there has been no change in factual circumstances or change in the law, Petitioners' motions must depend entirely on the dicta in *Kiryas Joel* as their sole basis for moving under Rule 60(b)(5). Because, as explained above, dicta does not constitute a change in law, the courts below properly denied Petitioners' motions.

C. Rule 60(b) Does Not Empower Courts to Overturn Valid Precedent Under the Circumstances Presented by This Case.

Rule 60(b) is not a source of judicial power.[5] Indeed, the

---

4. The very fact that Justices critical of *Aguilar* have called for its reconsideration in a proper case conclusively proves that it has not been overruled.

5. Rule 60(b), including its residual clause (6), merely codified writs of equity. *See* Fed. R. Civ. P. 60(b); *id.* advisory committee's note, 1946 amendment (Rule 60(b) permits "the granting of various kinds of relief from judgments which were permitted in the federal courts prior to the adoption of these rules" and "does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief."); *see also* 6A J. Moore, *Moore's Federal Practice* ¶ 60.04[1] at 60-34 to 60-35 (2d ed. 1996) (hereinafter, "*Moore's*"); 7 *Moore's* ¶¶ 60.26[1], [4], 60.27[1], at 60-242, 60-251 to 60-252, 60-265.

The residual clause (6) of Rule 60(b) — which authorizes relief from

(Cont'd)

Federal Rules of Civil Procedure are proscribed by the Rules Enabling Act from abridging, enlarging, or modifying any substantive right. *See* 28 U.S.C. § 2072(b) (1994); 28 U.S.C. § 723b (1940). Unable to meet the burden of showing a significant change either in factual conditions or in law, *Rufo*, 502 U.S. at 383-84, Petitioners seek to justify their invocation of Rule 60(b) with sweeping statements about the broad equity powers of the federal courts. However, although "the remedial powers of an equity court must be adequate to the task, . . . they are not unlimited." *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) (internal quotation omitted). Moreover, Petitioners mistakenly assume that the powers of an equity court are equally broad in all circumstances. Although a court may possess "broad plenary power" to formulate equitable relief in the first instance, that court may reassess a permanent injunction after entry of final judgment only when warranted by provisions of Rule 60(b). *See* 7 *Moore's* ¶ 60.26[4] at 60-256 to 60-257.

Nor can hopeful prognostication about a possible change in law establish the extraordinary and compelling circumstances that this Court has required to justify relief under clause (6) of Rule 60(b). *See Klapprott v. United States*, 335 U.S. 601 (1949) (clause (6) appropriate vehicle to obtain vacatur of default judgment revoking citizenship where movant was ill, penniless, and in jail at time judgment was entered); *Ackermann v. United States*, 340 U.S. 193 (1950) (movant who, on basis of alleged financial inability, did not appeal denaturalization proceedings

(Cont'd)
judgments for "any *other* reason justifying relief from operation of the judgment," Fed. R. Civ. P. 60(b)(6) (emphasis added) — is available only for circumstances not addressed by clauses (1) through (5). *See generally* 7 *Moore's* ¶ 60.27[1] at 60-266 & 60-266 n.12. Thus, insofar as petitioners cannot prove a "significant change in law" under clause (5), they may not fall back on clause (6) claiming an *anticipated* change in the law. Rule 60(b)(6) does not enlarge or modify the grounds for relief from a judgment; it merely "incorporates generally the substance of the old common law and equitable ancillary remedies." *Id.* at 60-265.

which government later admitted were not supported by sufficient evidence, did not state compelling reasons for relief under clause (6)); *see generally* 7 *Moore's* ¶ 60.27[1] at 60-270 (movant under Rule 60(b)(6) must allege and prove exceptional and compelling circumstances).

Petitioners' reliance on *Standard Oil Co. v. United States*, 429 U.S. 17 (1976), fails to offer succor. In *Standard Oil*, the oil company moved to set aside a judgment based on alleged misconduct by Government counsel and a material witness. Although the judgment had been summarily affirmed by the Supreme Court, the Court held that appellate leave was not procedurally required in order for the district court to "entertain" the Rule 60(b) motion. The question presented here is different: May the Supreme Court on appellate review of a properly decided 60(b) motion use the motion as a vehicle to overturn controlling precedent?

Rule 60(b) has never been used for the purposes which Petitioners seek, and for good reason: both as a matter of law and logic, it cannot itself be the vehicle to obtain a change in the law. The Court should not countenance such legal bootstrapping.

D. Rule 60(b) Does Not Permit Unsuccessful Parties to Relitigate Their Cases Before This Court.

The Secretary, at an earlier stage of these proceedings, acknowledged that there is no precedent for this Court's reconsideration of *Aguilar* in the procedural posture of this case:

> We are not aware, however, of any instance in which the Court has reconsidered the merits of a prior decision in the same case in a procedural posture similar to this one in

> which the case returned to this Court from a lower court after entry of a final judgment on remand and denial of a motion for relief from that judgment.

(Sec'y Br. in Support of Cert. Pet. at 11-12.)[6]

The reasons for this lack of precedent is obvious. This Court has long understood that it should not allow unhappy litigants to return to the Court with "the same questions which were open to dispute" during their initial appearance before the Court. *Illinois v. Illinois Cent. R.R. Co.*, 184 U.S. 77, 91-92 (1902) (internal quotation omitted). Such a policy, the Court noted, "would lead to endless litigation . . . if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms of their opinions. . . ." *Id.* (internal quotation omitted)[7] By permitting reconsideration of *Aguilar*, the Court would encourage unsuccessful parties to attempt to relitigate issues whenever they believe the Court might be willing to overrule a prior decision. But Rule 60(b) was never intended to serve as a

---

6. The Secretary's current position endorsing Petitioners' use of Rule 60(b) is a departure from his position in the court of appeals. There, the Secretary took no position on whether Rule 60(b) was a proper vehicle for seeking relief from the judgment in this case, and acknowledged that the district court did not abuse its discretion in denying Petitioners' motion. (Sec'y App. Br. at 12.) The Secretary now argues in support of this Rule 60(b).

7. More recently, an appellate court panel rejected a government defendant's attempt to use Rule 60(b) as a means of reinterpreting the law upon which a consent decree was based, and then modifying the decree subsequent to that very reinterpretation. *Fortin v. Commissioner Mass. Dep't of Pub. Welfare* 692 F.2d 790 (1st Cir. 1982). To permit such procedural maneuvers, the court of appeals for the First Circuit wrote, "would transform the modification procedure into an impermissible avenue of collateral attack. . . ." *Id.* at 799.

substitute for, or a second attempt at, a timely appeal of the merits of a final judgment.[8]

Compounding problems inherent in using Rule 60(b) as a vehicle for reconsidering the merits of a prior decision, Petitioners here rely on dicta as the basis for their prediction that the Court as presently constituted would decide *Aguilar* differently from the Court sitting twelve years ago. Indeed, if this premise is validated, any public statement by a Justice — whether in a dissenting opinion, an opinion attached to a denial of certiorari, or even a speech or article — could provide grist for a Rule 60(b) motion by an unsuccessful litigant seeking to overturn a prior decision. Cases decided by narrow majorities would be particularly susceptible to relitigation by parties who might view an intervening change in the Court's membership — or a perceived change of opinion by a Justice — as a basis for moving under Rule 60(b).

E. Use of Rule 60(b) in the Fashion Proposed By Petitioners Will Increase Burdens on the Federal Court System.

Petitioners and the Secretary acknowledge that, because the lower courts were bound to follow the directly controlling authority of *Aguilar, only* this Court can grant Petitioners' Rule 60(b) motion. (Agostini Petitioners' Br. at 47; Sec'y Br. at 44.) Moreover, they urged the lower courts promptly to deny their motion in order to facilitate expedited review by the Supreme

---

8. To discourage litigants from Rule 60(b) motions to reargue the merits of their cases, most appellate courts refuse to consider the substance of the underlying judgment when a denial of a Rule 60(b) motion is presented on appeal. *Browder v. Director Dep't of Corrections*, 434 U.S. 257, 263 n.7 (1978); *see, e.g., Calumet Lumber Inc. v. Mid-America Indus., Inc.*, 103 F.3d 612, 615 (7th Cir. 1996); *Wilson v. Fenton*, 684 F.2d 249, 251 (3d Cir. 1982); *Silas v. Sears, Roebuck & Co., Inc.*, 586 F.2d 382, 386 (5th Cir. 1978).

Court.[9] Petitioners thus seek to vest this Court with a novel form of jurisdiction — a hybrid of original jurisdiction and rehearing under Supreme Court Rule 44. This use of Rule 60(b) undermines the numerous safeguards carefully crafted by Congress and the Court to limit this Court's caseload.

Access to this Court has been continually narrowed by various "gate-keeping" measures. For example, Congress recently eliminated substantially all of the Court's mandatory review obligations by eliminating its appellate, as opposed to certiorari, jurisdiction over state and federal court rulings. *See* Pub. L. No. 100-352, 102 Stat. 662 (June 27, 1988) (amending 28 U.S.C. §§ 1254 and 1257). Similarly, the Court itself has insisted upon an increasingly sparing use of its original and certiorari jurisdiction and its power to grant rehearing. *See United States v. Nevada*, 412 U.S. 534, 538 (1973) (denying leave to file original complaint: "We seek to exercise our original jurisdiction sparingly"); *Louisiana v. Texas*, 176 U.S. 1, 15 (1900) (original jurisdiction "is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute"); *see also Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (Court will decline jurisdiction where state court ruled on adequate and independent state ground).

---

9. In its brief below, the Board urged the court of appeals as follows: "Should the Court agree with the District Court that in the absence of an explicit overruling of *Aguilar* by the Supreme Court, it is constrained not to grant relief to defendants, we respectfully request that the Court issue its order promptly so that defendants may seek Supreme Court review as quickly as possible." (Bd. App. Br. at 46.) *See also* n.4. Similarly, counsel for the Board reiterated this point at oral argument as follows: "We'd ask the Court, if you are inclined to deny the motion, we'd respectfully request that you do so quickly so that we can move on." (JA 773).

In the face of these efforts to narrow the Supreme Court's jurisdiction and caseload, Petitioners' use of Rule 60(b) represents a new, "back-door" mode of access to the Court which, if kept open, will invite other unsuccessful litigants to bring Rule 60(b) motions in the lower courts. It is no response to Respondents' concerns about the propriety of the use of Rule 60(b) to assert that "meritless attempts to gain reconsideration of precedent will be answered appropriately." (*See* Sec'y Br. at 16.) Even if meritless Rule 60(b) motions are denied by the lower courts, as occurred here, there is still nothing to prevent disappointed litigants from bringing the motions in the first place, appealing their denial, and then filing petitions for certiorari in this Court. The burden on the federal Courts will certainly increase if Rule 60(b) becomes available as a newly broadened procedural device to reconsider decisions.

In addition to increasing the Court's burden in the exercise of its certiorari jurisdiction, Petitioners' proposed use of Rule 60(b) would undercut the carefully designed strictures of Supreme Court Rule 44 governing rehearings. This Court rarely grants rehearing in deference to the interests of finality and in recognition of its limited capacity to reexamine the same issues in the same case repeatedly. *See* R. Stern, E. Gressman, *et al.*, *Supreme Court Practice* 620 (7th Edition 1993).[10] The Court's procedures on rehearing were intended to limit the number of rehearing petitions and to deter disappointed litigants from seeking rehearing simply because changes in the Court's personnel renewed their hopes for success.[11] *See id.*

---

10. From 1976 to 1982, only six petitions for rehearing were granted out of an average of over 100 per year in nonindigent cases; during the 1989-1991 Terms, only two petitions for rehearing were granted of the 1386 petitions that were filed. *Supreme Court Practice* 620.

11. For example, Justices who did not participate in the original consideration of a case typically do not participate in deciding whether a

(Cont'd)

F. Petitioners' Proposed Use of Rule 60(b) Will Erode the Institutional Integrity of the Court.

The legitimacy of the Supreme Court derives from its steadfast adherence to the rule of law and its refusal to countenance the notion that constitutional doctrine vacillates merely because of changes in the Court's membership. If the Court permits Petitioners' misuse of Rule 60(b), perception of the Court as an institution is likely to be diminished. The important policies embodied in the doctrines of *stare decisis* and law of the case will necessarily be eroded if a departure from *stare decisis* appears to be based on Justices' political ideology rather than principles of law. *Stare decisis* is a principle "of fundamental importance to the rule of law." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1988) (Kennedy, J.) (internal citations omitted).

Abandoning principles of *stare decisis* to overrule a case "upon a ground no firmer than a change in [the Court's]

(Cont'd)

petition for rehearing will be granted. *Supreme Court Practice* 621; *see, e.g., Associated Press v. Walker*, 389 U.S. (1967). Also, the Court grants petitions for rehearing only if at least one of the Justices who concurred in the original judgment, with the concurrence of a majority of the Court, agrees to grant the rehearing. Sup. Ct. R. 44.1; *see Ambler v. Whipple*, 90 U.S. (23 Wall.) 278, 281-82 (1874).

For these reasons, the Secretary's casual suggestion that the Court could simply treat the petitions for certiorari as petitions for rehearing (Sec'y Br. at 51 n.8) overlooks the fact that a rehearing of *Aguilar*, some twelve years after it was decided, is no longer authorized by the rules and practices of this Court. If these practices were followed in this case, and the only remaining Justice who voted with the majority in *Aguilar* voted to grant rehearing, the additional affirmative votes of the remaining two Justices eligible to vote on rehearing would be insufficient to achieve the "majority of the Court" necessary to grant rehearing under Rule 44.1.

membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception can do more lasting injury to this Court and to the system of law." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting); *see also Casey*, 505 U.S. at 864 ("To overrule prior law for no other reason than [a present doctrinal disposition to come out differently] would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.")

"The rule of law is about form."[12] Petitioners' use of Rule 60(b) damages the process by which consideration of a case must proceed. Because our legal system derives much of its legitimacy from adherence to and respect for form, this Court should rebuff Petitioners' inappropriate use of Rule 60(b). There is nothing inequitable about a rule of law which provides that a party that has had a full and fair opportunity to litigate its claim to the Supreme Court is bound by the decision.

For these reasons, Respondents respectfully submit that permitting Petitioners' use of Rule 60(b) to seek rehearing in a case they lost before the Supreme Court, based on passing statements by individual Justices, would elevate expediency over the bedrock principles of fairness and finality upon which this Court, and our system of law, were built.

---

12. A Scalia, *A Matter of Interpretation: Federal Courts and the Law* 25 (1997).

II.

THE PRE-1985 NEW YORK CITY PROGRAM UNDER WHICH PUBLIC SCHOOL TEACHERS AND COUNSELORS PROVIDED TITLE I SERVICES INSIDE PAROCHIAL SCHOOLS WAS, AND IF RE-INSTITUTED WOULD BE, A VIOLATION OF THE ESTABLISHMENT CLAUSE UNDER DECISIONS OF THIS COURT, IN ADDITION TO *AGUILAR*, THAT HAVE NEVER BEEN CALLED INTO QUESTION.

A. Petitioners' Abuse of The Concept of "Neutrality".

Petitioners quote from opinions of this Court recognizing that government should maintain "neutrality" towards religion, and that the Establishment Clause should not be construed to the contrary. (Chancellor's Br., pp. 27-29; Agostini Br. 15-21.).[13] As Petitioners are obliged to acknowledge, however, it is not enough in this Court to rely on generalities, and even " 'the Establishment Clause's concept of neutrality may not be 'self-revealing.' " (Agostini Br., p. 15, quoting *Lee v. Weisman*, 508 U.S. 577, 627 (1992) (SOUTER, J., concurring). Clearly, whether the Program in question in this case is, or is not, "neutral" towards religion depends upon the particular relevant and material facts of the Program (some of which, as will be noted below, have never been fully and properly explored). As Petitioners further acknowledge,

---

13. In his brief, the Secretary of Education appears to confine his argument to the point that *Aguilar* allegedly represents "A Departure From Most Of The Court's Previous Entanglement Cases" (Secretary's Br., pp. 23-36), as if in reviewing the constitutionality of the (pre-*Aguilar*) Program, this Court should only consider the Program within the limited confines of the doctrine of "excessive entanglement." The Agostini Petitioners, correctly, do not appear to take that approach.

> "Every government practice must be judged in its unique circumstances to determine whether it is an endorsement or disapproval of religion" [quoting *Capitol Square Review & Advisory Bd.*, 115 S. Ct. 2440, 2454 (1995) (O'CONNOR, J., concurring in part and concurring in the judgment)]. Both "the history and administration of a particular practice" must be examined. *Id.*

(Agostini Br., p. 25.)

Further acknowledging that they must define "neutrality" in order to make it sustain the Program in question in this case, Petitioners propose "neutrality" is promoted when "government benefits are made available generally to a broad class of citizens defined without reference to religion." (Chancellor's Br., p. 25; Agostini Br., p. 16.) Subsequently, however, they concede that "neutrality" is not "promoted," and the Establishment Clause is violated, when a government Program " 'in effect subsidize[s] the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects.' " (Agostini Br., p. 22, quoting *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 12, which in turn quoted *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 397; Chancellor's Br., p. 30.)

Respondents respectfully submit, however, that reference to "neutrality," even as thus defined, does not dispose of the question whether the Program here under consideration falls within one of the two aforementioned categories. Petitioners appear to ignore the possibility that the Program may, and probably does, to some extent fall within both categories, further complicating the question whether the Program merely promotes "neutrality" or offends the Establishment Clause. (This fact,

Respondents reiterate, further demonstrates the impropriety of resolving that question in this unique proceeding based on a record in which the question was never addressed by the parties or determined by any court, including the Court that decided *Aguilar*.)

Reference to the concept of "neutrality" also fails to dispose of another serious question: whether in the Program, in which public school teachers and guidance counselors performed their services inside the parochial schools of New York City, "the instructional services offered by the state effected a 'symbolic union of church and state' that was 'sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices.' " (Agostini Br., p. 24, *quoting Grand Rapids*, 473 U.S. at 390.) The Chancellor and Board of Education appear to ignore this question entirely, although it was addressed by the parties, and, Respondents respectfully submit and will demonstrate below, was correctly and effectively resolved by the Court in *Aguilar*).

Lastly, reference to the concept of "neutrality" does not dispose of the question explicitly resolved in *Aguilar*: (a) whether it was reasonable and proper under the Establishment Clause and the decisions of this Court thereunder to guard against public school teachers and guidance counselors engaging in conduct supportive of the religion or religious mission of the parochial schools by prohibiting them from performing services inside those schools under the auspices of the pre-1985 Title I Program in New York City; or (b) whether it should have been assumed that those teachers and counselors would not engage in such conduct by reason of their professional training, the details of the Program in question, and the fact that they were state employees under state control, until there was proof to the contrary. (Secretary's Br., p. 30; Chancellor's Br., p. 32; Agostini Br., pp. 32-35.)

In *Aguilar*, the Court decided in favor of the prophylactic approach under the rubric of the doctrine of "excessive entanglement." The Secretary takes the position that this decision was allegedly not in accord with the Court's pre-*Aguilar* decisions, a position with which we respectfully disagree, and note only that it is one of three serious questions in this case not resolved by general reference to the concept of "neutrality."

The Agostini Petitioners, while taking the same position as the Secretary on this third question, launch an attack on the entire doctrine of "excessive entanglement" (Agostini Br., pp. 28-32), and the Chancellor and Board of Education call into question, albeit briefly, the entire three-prong test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). (Board Br., p. 31.) As noted, the Secretary takes the more measured position that in *Aguilar*, the doctrine of "excessive entanglement" was merely applied improperly.

Respondents respectfully submit that this unique proceeding, in which Petitioners seek to overturn a twelve-year-old decision of this Court, essentially on the original record, under a procedural rule never before used for such purpose, is questionable enough without being used as a springboard to overturn substantive rules of law that have guided this Court in its decisions for more than 25 years, and continue to guide lower courts every day.

In this brief, therefore, Respondents will eschew defending the three-prong test in *Lemon*, including the "entanglement" prong, worthy as we believe that test to be. Instead we will confine ourselves to demonstrating, as we believe we can, by reference to the decisions of this Court in cases before and after *Aguilar*, that the Program in the present case violated the Establishment Clause.

In short, Respondents believe that, contrary to our adversaries' position, the propriety or impropriety of the prophylactic approach adopted by this Court in *Aguilar* can hardly be determined by reference to the general concept of "neutrality"; that such approach is consistent with other decisions of this Court; and that it is a reasonable and salutary application of the Establishment Clause whether or not it is considered under the rubric of the doctrine of "excessive entanglement."

B. Petitioners' Cases Are Inapposite.

The Chancellor and Board of Education begin the list of cases they cite by referring to *Kiryas Joel* and the comments of the Justices concerning *Aguilar*. (Chancellor's Br., p. 24.) Respondents believe that those comments are not, as the Chancellor and the Board indicate, dispositive of the constitutional issue on this appeal. We choose to rely on the statement concerning those comments in the decision of the District Court in this proceeding:

> [I]t is possible to make too much of the *Aguilar*-bashing . . . . The various comments about the decision in *Kiryas Joel* were made (or joined in) without the benefit of briefing and oral argument, and three of the five Justices were not on the Court when it decided *Aguilar*.

(Appendix to Chancellor's Pet. for Cert., p. 16, n. 1.)

With two exceptions, Petitioners cite cases decided by this Court after *Aguilar*. In the first exception, *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court held that a state statute did not violate the Establishment Clause by allowing students

attending "non-profit" schools, including religious schools, to ride free of charge on public transportation. Petitioners cite *Everson* for the Court's general comment on "neutrality." The most striking comment of the Court in *Everson*, however, and the one universally accepted as indicating its significance was that

> There MR. JUSTICE BLACK, writing for the majority, suggested that the decision *carried "to the verge" of forbidden territory under the Religion Clauses.*

BURGER, C.J., writing for the Court, in *Lemon*, 403 U.S. at 612 (emphasis added).

Despite Justice Black's assurance, moreover, a vigorous and prophetic dissenter, called attention to the fact that

> Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into public schools. The other, to obtain public funds for the aid and support of various private religious schools.

Everson, 330 U.S. at 63 (RUTLEDGE, J., dissenting.)

In the one other pre-*Aguilar* decision of this Court cited by Petitioners, *Board of Education v. Allen*, 392 U.S. 243 (1968), the Court held that a state statute did not violate the Establishment Clause by allowing the state to lend non-religious textbooks to students at certain grade levels, including those attending parochial schools. In subsequently refusing to extend

what Respondents respectfully submit was, in *Allen*, the high-water mark of any form of government aid to parochial schools students, this Court noted:

> In *Allen* the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the State would be asked to provide. We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not.

BURGER, C.J., writing for the Court in *Lemon*, 403 U.S. at 616.

Most of the decisions subsequent to *Aguilar* on which Petitioners rely have far less relevance than *Everson* or *Allen* to the use of public funds for education and educational procedures inside parochial schools or, more specifically, the use of public funds to provide teachers, counselors or assistants in those schools. Thus, in *Mueller v. Allen*, 463 U.S. 388 (1983) the Court upheld a state statute providing a limited tax deduction to taxpayers for sums spent on dependents attending elementary and secondary schools, including parochial schools.

In *Board of Education v. Mergens*, 496 U.S. 226 (1990), the Court upheld a federal statute that guaranteed student religious groups in public institutions equal access with non-religious groups to school rooms in order to hold meetings (following the holding in a similar case, *Widmar v. Vincent*, 454 U.S. 263 (1981), which preceded *Aguilar*).

In *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 115 S. Ct. 2510 (1995), on which Petitioners rely heavily, the Court held that a university violated the free speech rights when it refused to pay, out of a general fund held for student purposes, the printing costs of a student journal that promoted a particular religious point of view.

As can readily be seen, none of the above cases even remotely involved parochial schools (with the possible exception of *Mueller*, and then only very indirectly), no less the use of public funds to provide teachers, counselors or assistants of any kind to instruct, counsel or otherwise assist students inside those schools. Additionally, *Mergens*, *Widmar* and *Rosenberger* involved the Free Speech Clause of the First Amendment as much as, if not more than, the Establishment Clause. The application of the general concept of "neutrality" to the facts of those cases, Respondents respectfully submit, presents a far different question, or far different questions, from the application of the concept to the facts of *Aguilar*.

The facts in only two of the cases cited by Petitioners bear any resemblance to the facts in *Aguilar*, and not a very close resemblance at that.

In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court held that a public school district did not violate the Establishment Clause by providing a sign-language interpreter to a deaf student on the premises of a parochial school, even though the interpreter transmitted religious matter to the student.

Similarly, in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court allowed a State to provide vocational rehabilitation assistance to a blind student at a religious college.

To begin with, it bears noting that *the very same Court that decided Witters, establishing a precedent for Zobrest, had decided Aguilar, and all five of the Justices who formed the majority in Aguilar joined in the decision in Witters.*

At this point, it is also important to note that *all of the Justices who joined or concurred in the decision in Grand Rapids also joined in the decision in Witters.* Clearly, those Justices saw a distinction between the cases. Respondents respectfully submit that the distinction they saw has continued to be recognized, is valid on the facts and the law, and should be dispositive of Petitioners' attempt to persuade this Court to overrule *Aguilar.*

C. *Aguilar* Is Consistent with this Court's Oldest and Most Recent Decisions in Point.

Respondents respectfully submit that (the pre-*Aguilar*) Program violated the Establishment Clause in three ways:

(1) The symbolic union of church and state inherent in public school teachers and guidance counselors providing instruction and counseling inside parochial schools conveyed a message of government support for the religious mission of the schools to the students attending them and the general public.

(2) The Program in effect subsidized the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching essential secular subjects to a substantial portion of their students.

(3) The only reasonably certain way to make sure that the public school teachers and counselors obliged to

> teach and counsel parochial school students would not be encouraged by their surroundings to engage, deliberately, ignorantly or inadvertently, in conduct supportive of the parochial school and its religious mission was to prohibit them from performing their services inside the parochial schools.

1. The Program Was Impermissible Because It Created A Symbolic Union Of Church And State.

As noted, only the Agostini Petitioners address this question. In doing so, they argue against Respondents' position only by comparison of the Program in *Aguilar* to the two programs struck down in *Grand Rapids* (Agostini Br., pp. 24-25). They point to the fact that in one of the two programs in *Grand Rapids* full-time teachers in the sectarian schools were hired. They then go on to say that thereby, allegedly "the public and private programs were 'united' in a single set of teachers." (*Id.*, p. 25). Respondents would have to spend a substantial amount of time trying to decipher that argument, but there is no need to do so. When Justice BRENNAN, who wrote for the majority of the Court in *Grand Rapids*, wished to exemplify what he meant by "symbolic union," *he quoted from the Court of Appeals decision in Aguilar describing the Program under consideration in Aguilar!*

> As Judge Friendly, writing for the Second Circuit in the companion case [*Aguilar*] to the case at bar, stated:
>
> > Under [New York] City's plan public school teachers are, so far as appearance is concerned, a regular adjunct of the religious school. They pace the same halls, use classrooms in the same building, teach the same

> students, and confer with the teachers hired by the religious schools, many of them members of religious orders. The religious school appears to be a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public. *Felton v. Secretary, United States Dept. of Ed.*, 739 F.2d 48, 67-68 (1984). This effect — the symbolic union of government and religion in one sectarian enterprise — is an impermissible effect under the Establishment Clause.

473 U.S. at 392.

As noted by Justice BRENNAN, the concept of a symbolic union of government and religion having the effect of showing government approval of religion and thereby violating the Establishment Clause predates *Grand Rapids*, 473 U.S. 389-90. It was the rationale of the decision in *McCollum v. Board of Education*, 333 U.S. 203 (1948) (public school prohibited from allowing part-time religious instruction on its premises as part of its school Program, although participation was voluntary and instruction was provided by non-public school personnel); *Abingdon School District v. Schempp*, 374 U.S. 203, 222 (1963) ("powerful sects or groups might bring about a fusion of governmental and religious functions . . . to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies"); *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) (state statute prohibited from vesting in governing bodies of schools and churches power to veto liquor licenses for premises within 500-foot radius).[14]

---

14. *Larkin* is not distinguishable by reason of the veto power given to the churches. As noted above, under Title I, just such a veto power is available (Cont'd)

2. *The Program Subsidized The Religious Functions of The Participating Parochial Schools.*

The Agostini Petitioners are also alone in dealing with this point. With all due respect, they also do not help to clarify either this question or its answer; rather, they slur over the distinct difference between "*direct grants*" of government aid resulting in impermissible subsidization of parochial schools, without public funds being paid to the parochial schools, and "*direct funding*" in which government money is paid directly and impermissibly to parochial schools. It is clear that the programs in *Grand Rapids* were held to constitute "direct grants" because the Court determined that the aid given to the parochial schools in the form of publicly paid teachers who provided instruction in secular subjects on the premises of those schools directly and substantially benefitted the schools by relieving them of their responsibility to provide instruction in such subjects. 473 U.S. at 395.

In *Zobrest* (and also in *Russman v. Sobol*, 85 F.3d 1050 (2d Cir. 1996)), *petition for cert. pending, No. 96-776*, cited by the Chancellor and Board of Education in another context [Br., p. 22]), this Court (and the Second Circuit) distinguished the programs in *Grand Rapids* from the individualized assistance provided to a single handicapped student attending a parochial school by referring to the "direct grants" in *Grand Rapids* (*Zobrest*, 509 U.S. at 12). It seems clear that this Court (and the Second Circuit) were not referring to "direct funding," but

---

(Cont'd)

to parochial school authorities. Despite the statutory language purporting to deliver benefits directly to students, no benefits can be delivered unless their school authorities elect to join a particular program, and the parochial school authorities have refused to do so when displeased with the program presented to them. (*Supra*, p. 9.)

merely to the benefit to the parochial schools in the City of Grand Rapids that resulted from the City providing publicly-paid teachers to instruct the students of those schools on premises.

In *Grand Rapids*, moreover, the Court rejected the argument that the aid, like the textbooks in *Allen*, flowed primarily to the students rather than to the parochial schools:

> Of course, all aid to religious schools ultimately "flows to" the students, and petitioners' argument if accepted would validate all forms of nonideological aid to religious schools, including those explicitly rejected in our prior cases. Yet in *Meek*, we held unconstitutional the loan of instructional equipment and in *Wolman*, we rejected the fiction that a similar program could be saved by masking it as aid to individual students. *Wolman*, 433 U.S. at 249, n. 16.

473 U.S. at 495.

Additionally, in *Grand Rapids*, the Court rejected the argument that the aid in question merely "supplemented" rather than "supplanted" the programs offered in the religious schools:

> First, there is no way of knowing whether the religious schools would have offered some or all of these courses if the public school system had not offered them first. The distinction between courses that "supplement" and those that "supplant" the regular curriculum is therefore not nearly as clear as petitioners allege. Second, although the precise course offered in these programs

> may have been new to the participating religious schools, their general subject matter — reading, mathematics, etc. — was surely a part of the curriculum in the past, and the concerns of the Establishment Clause may be triggered despite the "supplemental" nature of the courses. Third, and most important, petitioners' argument would permit the public schools gradually to take over the entire secular curriculum of the religious school, for the latter could surely discontinue existing courses so that they might be replaced a year or two later by a . . . course with the same content.

473 U.S. at 396.

This last point is critical in the present case, procedurally as well as substantively. Petitioners' argument that the Program here in question "supplemented" rather than "supplanted" comes in two parts. First, they argue that the Program only supplemented parochial school services because Title I requires that the aid provided thereunder must do so. Second, the Agostini Petitioners point to the bare (and identical) assertions of two Roman Catholic prelates that the courses in "remedial" reading and "remedial" mathematics in the Program allegedly did not "supplant" any courses in the curriculum of the Catholic parochial schools (JA 660 and 685). To these bare statements, the Agostini Petitioners add the argument that the Catholic prelates' assertions were never challenged by Respondents in the District Court.

Both arguments are specious. One of the procedural defects in this strange proceeding, purportedly under Rule 60(b), is that there was no opportunity afforded Respondents in the District

Court to argue any of the "merits" of the constitutional issue (JA 802). Even if there were, Respondents would not have risen to the bait because it has always been our position that we should not have had the obligation to come forward in the District Court with a defense of a decision of this Court that even the lower Court recognized it did not have the power to overrule.

Accordingly, Respondents respectfully submit there is a serious factual question in this case, never fully addressed by the parties, concerning whether the aid provided to parochial schools under the Program "supplemented" or "supplanted." We believe that the "remedial" instruction provided to parochial students in reading and math clearly "supplanted" efforts the parochial school teachers had previously made to bring their below-grade level students up to grade level. Conversely, we find it more than difficult to believe that if the Program had not been in operation, and public school teachers had not been sent to do the job, their parochial school counterparts would not have continued to do all in their power to bring their below-grade wards up to accepted norms.

3. The Program Is Impermissible Because There Is No Sure Way To Prevent Public Employees On Parochial School Premises From Supporting The Religion Or Religious Mission Of Those Schools.

Respondents respectfully submit that the essential determination in *Aguilar* is that there is no way to ensure that public school teachers and guidance counselors performing services inside a parochial school will refrain from engaging in conduct offensive to the Establishment Clause unless they are subject to systematic surveillance that would be too extreme to be workable. In *Aguilar*, in line with the three-prong test in *Lemon* and the application of that test in *Marborough* and *Meek*, the Court characterized any such program of surveillance as one

that would be afoul of the doctrine of "excessive entanglement." Respondents further submit, however, the reference to that doctrine is unnecessary; it should be sufficient to hold that under such circumstances it is reasonable and proper under the Establishment Clause, as a prophylactic measure, to prohibit public school teachers and guidance counselors, and certainly an entire group of public school teachers, from performing services inside parochial schools.

The Agostini Petitioners state that the principle criticism "of the entanglement prong is that it forbids what the 'effects' prong requires." (*quoting* McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 127-34). But there is no reason to assume that the "effects prong" requires a system of surveillance where none would be workable; rather, it is more reasonable to assume that the "effects prong" merely requires that conduct offensive to the Establishment Clause which can not be prevented by any workable system of surveillance should be prohibited.

Here, too, contrary to the Agostini Petitioners' argument, the question at hand cannot be resolved by reference to the general concepts of "neutrality" and "separation." (Agostini Br., p. 19.) Respondents respectfully submit that the question whether there is sufficient likelihood that a public school teacher or counselor placed on regular duty inside a parochial school, and incapable of being monitored, is likely to engage in conduct offensive to the Establishment Clause so as to make it reasonable and proper to prohibit such placement simply cannot be resolved by reference to such general concepts.

Nor can the question be resolved by reference to the argument that the prophylactic measure taken in *Aguilar* "reverses the traditional burden of proof that requires the plaintiff to establish a legal claim." (Agostini Br., p. 30.)

> [T]axpayers like these [*Aguilar*] plaintiffs .... cannot reasonably be expected to mount perpetual guard. In our view, the Court has been wise in relying upon reasoned apprehension of potentials rather than sanctioning case-by-case determination of the precise level of risk of fostering religion, since such an empirical approach would inevitably lead to litigation in an area where some degree of certainty is needed to prevent constant controversy.

Judge Friendly, writing for a unanimous Court of Appeals in *Felton*, 739 F.2d at 66.

The Agostini Petitioners base one of their main arguments on an erroneous version of the facts. Thus, they argue that supervision in this case is "*of* a public employee *by* a public employee." (Br., p. 33.) But the very reason why "supervision" to guard against conduct offensive to the Establishment Clause is unworkable in this case is that, if it were to approach being effective, it would have to encompass not only surveillance of the public school teachers and counselors, but their parochial school students, the parochial school teachers and principal, and the parents of the parochial school students.

The Agostini Petitioners find no fault with *Lemon* and the Court's statement therein that "a dedicated religious person, teaching in a school affiliated and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." (*quoting* 403 U.S. at 618; Agostini Br., p. 33). But, Respondents respectfully submit, that same description, word for word, would fit a Catholic public school teacher or counselor performing services in a Catholic parochial school or a Jewish public school teacher or counselor serving in a Hebrew Day school.

The Agostini Petitioners argue that *Lemon* was correct because the teachers there, although paid by a public agency, were "accountable to religious school officials," whereas in this case, presumably, the teachers and counselors are accountable to public school officials. Respondents respectfully submit that any person is more likely to be more "accountable" to those who pay his salary than anybody or anything else, except perhaps the payee's religious preference. An accompanying argument suggests that it should be assumed that public school teachers and counselors may be relied upon to refrain from engaging in conduct offensive to the Establishment Clause because to assume otherwise would be "demeaning to their professionalism." Any such argument is, to say the least, equally demeaning to the parochial school teachers in *Lemon* about whom no such assumption was made.

Lastly, the Agostini Petitioners fall back on the alleged fact that there was no incident "known" to the Chancellor in which any public school teacher or counselor in the (pre-*Aguilar*) Program engaged in any conduct offensive to the Establishment Clause. As noted above, however, there would have been no way that any such incident would have come to the attention of the Chancellor unless a teacher or counselor would have reported on his own misconduct.

Respondents submit that the prophylactic approach of the Court in *Aguilar* was particularly warranted in connection with a Program of remedial instruction in which public school teachers and counselors were presumably exercising their best efforts to raise parochial students' achievement to grade level. We submit the most fundamental task of such teachers or counselors must be to build the students' respect for and interest in study generally, but more particularly in their regular place of study, which in this case was a school whose only reason for existence was its religious mission.

CONCLUSION

In sum, Respondents respectfully submit that there are three powerful reasons to reaffirm *Aguilar* even without reference to the *Lemon* test or the doctrine of "excessive entanglement" (1) the symbolic union of church and state in the manifold relations in the (pre-*Aguilar)* Program between the public school teachers and counselors engaged in the Program and their parochial school counterparts, the parochial school principals and the parents of the parochial school students; (2) the substantial subsidization of the religious mission of the parochial schools by relieving them of the burden of bringing their below-grade level students up to grade level; and (3) the lack of any workable system of surveillance that would prevent public teachers and counselors performing services regularly inside parochial schools from engaging in conduct offensive to the Establishment Clause.

Respectfully submitted

STANLEY GELLER
Counsel of Record
Attorney for Respondents
750 Lexington Avenue
New York, New York 10022
(212) 486-4590